

IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED
March 31, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

MARY E. NELSON STRANGE,) C/A NO. E1999-1531-COA-R3-CV
)
Plaintiff-Appellant,) HAMILTON CIRCUIT
)
vs.) HON. ROBERT M. SUMMITT,
) JUDGE
HIRAM G. HILL,)
) REVERSED AND
Defendant-Appellee.) REMANDED

PAMELA R. O'DWYER, Chattanooga, for Plaintiff-Appellant.

HIRAM G. HILL, *pro se*.

OPINION

Franks, J.

This appeal arises from the former wife's Complaint to increase her alimony payment, and the former husband's cross-action and Counter-complaint to terminate alimony payments. After delays and hearings, the Trial Judge granted the husband's Counter-complaint and terminated the alimony award and the wife has appealed.

The initial issue on appeal is whether the Trial Judge was empowered to enter orders in this case, after the expiration of his term of office.

The wife argues that because a Judge only has the authority to sign orders up to sixty days after he vacates office, the orders signed in this case are void. A judge's ability to act beyond the limits of his term of office is controlled by statute. T.C.A. §17-1-304 provides:

(a) Whenever any trial judge shall vacate the office of Judge for any cause whatsoever other than the death or permanent insanity of such judge, the judge shall have and retain, as to cases pending before the judge, the trial of which has begun prior to the judge's vacation of office, all the powers in connection with the cases which the judge might have exercised therein, had such vacation of office not occurred.

(b) The judge's powers in this respect shall not extend beyond sixty (60) days from the date of such vacation of office.

(c) Such powers shall especially include, but shall not be limited to, the right to render judgments, to hear and determine motions for new trial, to grant appeals and to approve bills of exceptions.

(d) Such powers may be exercised by such judge either within or without the geographical limits theretofore assigned by law to such judge.

Under this statute, "a trial judge has sixty days from the date of vacation of his office . . . in which to conclude cases pending before him." *Brown v. State*, 644 S.W.2d 418 (1982).

Because the statutory time limit is directory and not mandatory, equity must be considered. *See Williams v. Daniels*, 545 S.W.2d 120 (Tenn. Ct. App. 1976); *Bedford County Hospital v. County of Bedford*, 304 S.W.2d 697 (Tenn. Ct. App. 1957); and *Trapp v. McCormick, et ux*, 130 S.W.2d 122 (Tenn. 1939). In this case, the Judge had ruled from the bench on the issues, and all that was left to do was sign the Order which the husband submitted under the five day rule, prior to the expiration of the sixty days following the Judge's retirement. The reason for the delay in signing the Order is unknown. However, we conclude it would be a waste of time and judicial resources for this case to be remanded for a whole new hearing and determination, and under the circumstances, the Judge properly signed the Order.

Next, the wife appeals the issue of the termination of her alimony which was in the amount of \$200.00 per month. The husband's counter-petition alleged that the parties had lived together for approximately two and a half years, and that the Husband had paid alimony since 1992, and that the wife "receives substantial sums from Social Security benefits and is gainfully employed and capable of paying her own way", and that the wife has various judgments against the husband in excess of \$18,000.00.

The Trial Judge found that there had been a material change in circumstances primarily on the fact that the wife was working part time, whereas at the time of the divorce, she had no ability to work at all. T.C.A. § 36-5-101(a)(1) provides in pertinent part:

On application of either party for spousal support, the court may decree an increase or decrease of such allowance on upon a showing of a substantial and material change of circumstances.

It is not sufficient to simply show a change of circumstances. The change must be "substantial and material." The change must affect the obligor spouse's ability to pay or the obligee spouse's need for the alimony awarded. *Bowman v. Bowman*, 836 S.W.2d 563 (Tenn. Ct. App. 1991) (citing *Threadgill v. Threadgill*, 740 S.W.2d 419, 422-423 (Tenn.App.1987)).

If the party seeking modification meets this burden of proof, the Court must then use the same factors set out in T.C.A. § 36-5-101(d)(1) applicable to the initial grant of support and maintenance.

The general standard of review was articulated by the Court in *Sannella v. Sannella*, 993 S.W.2d 73, 76 (Tenn. Ct. App. 1999).

Because support decisions are factually driven and involve considering and balancing numerous factors, we give wide latitude to the trial court's discretion. See *Cranford v. Cranford*, 772 S.W.2d at 50. We review a trial court's decision according to the familiar Tennessee Rules of Appellate Procedure 13 (d) standard, and we will uphold the trial court's decision unless it is based on an improper application of the law or is against the preponderance of the evidence.

On June 9, 1989, the wife was in a motor vehicle accident, and was in a coma for a period of time and sustained brain damage. As a result, she began receiving Social Security prior to the divorce, which was granted in 1994. While the Social Security payments have gone up about \$25.00 a month since that time, it was foreseeable that such benefit would be adjusted over the years for inflation. Additionally, the various judgments against the husband do not constitute a change of circumstances. They were also known at the time of the divorce decree, are separate from the alimony payments and do not amount to a change in circumstances required to even trigger an analysis.

The only change in circumstances from the time of the divorce decree is the fact that the wife is now working part time. The issue thus becomes whether this change is so substantial and material as to establish a basis for modification of the alimony award. The evidence presented at trial was that the wife worked a couple of days a week for her friend at a clothing store. In 1997, her total income from that job was \$2,956.00. Her employer testified that she hired the wife out of sympathy; to help her out financially. She stated the wife could not work much by herself and had trouble on the job.

The Court found that “while there is some evidence that her friend is helping her, that doesn’t mean she doesn’t have ability to do something.” There is no evidence that she the wife had the ability to earn more than the amount that she earned in 1997, and we conclude that this income from her work, under the circumstances, does not amount to a substantial and material change as contemplated by the statute as necessary to trigger a modification in alimony support. *See Johnson v. Johnson*, 1989 WL 105654 (Tenn. Ct. App. 1989); *Elliot v. Elliot*, 825 S.W.2d 87 (Tenn. Ct. App. 1991).

Assuming *arguendo* the wife’s employment constituted a material and substantial change in circumstances, termination of alimony would be improper on this record. Once a change has been found, the Court must conduct an analysis similar to that which is done for preliminary determination of alimony, considering all the factors set forth in T.C.A. § 36-5-101. While the statute permits the consideration of many factors, the recipient spouse’s demonstrated need for spousal support is the single most important factor. *Sannella v. Sannella*, 993 S.W.2d 73, 76 (Tenn. Ct. App. 1999); *and Lancaster v. Lancaster*, 671 S.W.2d 501, 503 (Tenn. Ct. App.1984)). *Also see Duncan v. Duncan*, 686 S.W.2d 568 at 572 (Tenn. Ct. App.1984). Considering the wife’s needs, her scant increase in income does not warrant a

termination of husband's alimony obligation.

Accordingly, the Trial Judge's Order is reversed, and the alimony award of \$200.00 per month will continue. We overrule the wife's motion to award attorney's fees on appeal, and remand for the entry of an order consistent with this Opinion, with the cost of the appeal assessed to the husband.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P.J.

D. Michael Swiney, J.